INDEX

CITATIONS

465307—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 95

JOSEPH A. PIUMA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 44) is reported in 40 F. Supp. 119, and the opinion of the Circuit Court of Appeals (R. 76) is reported in 126 F. (2d) 601.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 9, 1942, and petition for rehearing was denied April 8, 1942 (R. 81–82). Petition for writ of certiorari was filed May 19, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether an order of the Federal Trade Commission directed against unfair methods of competition requires for its support a finding of specific injury to identified competitors.

(2) Whether the provisions of the Act of March 31, 1938, which impose a penalty for violating an order by the Federal Trade Commission after expiration of the time allowed for obtaining judicial review, are unconstitutional.

STATUTES INVOLVED

The first two paragraphs of Section 5 of the Federal Trade Commission Act, 38 Stat. 717, 719, provided, prior to this amendment by the Act of March 21, 1938:

> * * * unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Section 3 of the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., sec. 45, amended Section 5 of the Federal Trade Commission Act so as to read in part as follows:

> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of

competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * *

* * * * *

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

* * * * *

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 5 (a) of the Act of March 21, 1938, provides:

In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section

5 (c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act.

STATEMENT

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, provides that any person violating an order issued thereunder after the order has become "final" shall be liable to the United States for a civil penalty of not more than $5,000 for each violation. The present proceeding is an action by the United States to recover such penalty. Petitioner's answer admitted all the material allegations of the Government's complaint (R. 27–30) and the United States thereupon moved for summary judgment on the pleadings (R. 38).[1] The District Court granted this motion and entered judgment for the United States in the amount of $3,250, or $250 for each violation (R. 52). The Circuit Court of Appeals affirmed, characterizing the appeal as "frivolous" (R. 78, 81).

The following facts set forth in the Government's bill of complaint are undisputed:

On April 6, 1937, the Federal Trade Commission, after a hearing on a complaint issued by it in 1934 charging petitioner with violating Section 5 of the

[1] Rule 56 (a) of the Rules of Civil Procedure provides:

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Federal Trade Commission Act, made findings of fact and entered an order directing petitioner to desist from making certain specified representations in connection with the interstate sale of a medicinal preparation known as Glendage (R. 3–6, 27–29). The Commission found that petitioner's product is sold in interstate commerce in substantial competition with other products which are sold to the public as useful in the treatment of ailments for which Glendage is represented to be an effective treatment (R. 20–21). The Commission also found that misrepresentations made by petitioner concerning his product induced the erroneous belief on the part of many persons that petitioner's product "is a competent and effective treatment or corrective for use in remedying the ailments and conditions for which it is recommended," and caused a "substantial portion" of such persons, because of such erroneous belief, to purchase his product, "thereby unfairly diverting trade" from competitors who truthfully represent their preparations, to the substantial injury of these competitors (R. 25–26).

Petitioner did not on or before May 20, 1938, file any petition for review of the order of April 6, 1937, and the order became final within the meaning of the Act of March 21, 1938 (R. 6–7, 29).[2]

[2] Section 5, as amended by the Act of March 21, 1938, provides in subsection (g) that orders of the Commission under that section become final if no petition to review the order

Subsequently, petitioner on 13 different occasions published in newspapers having an interstate circulation an advertisement which violated the Commission's order of April 6, 1937 (R. 7–10, 29–30).[3]

ARGUMENT

1. Petitioner contends (Pet. 15) that the Commission had no "jurisdiction" to enter an order under Section 5 in the absence of "specific findings of fact establishing injury" to identified competitors and that the order of April 6, 1937, not being supported by such findings, is void.

Petitioner's contention is not timely. Under the Act of March 31, 1938, the Commission's order has become final. Since petitioner failed to petition for review as required by Section 5 (g), he cannot now attack the sufficiency of the Commission's findings.

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is filed within the time allowed therefor (*supra*, p. 3). The Act also provides that, in the case of orders issued and served prior to its enactment, the time allowed for filing a petition for review is 60 days from the date of enactment, in other words, until May 20, 1938 (*supra*, pp. 3–4).

[3] Petitioner admitted the publications as alleged in the complaint but averred that the advertisement as set forth therein shows on its face that it did not violate the order of April 6, 1937 (R. 29–30). The issue of fact thus raised, which requires for its determination solely a comparison of the words of the advertisement with the text of the Commission's order, was decided adversely to petitioner by both the District Court (R. 51) and the Circuit Court of Appeals (R. 80), and the petition for writ of certiorari does not request review of this question of fact.

But in any event, petitioner's contention is without merit and has been squarely rejected by this Court. *Federal Trade Commission* v. *Raladam Co.*, No. 826 this Term, decided April 27, 1942, sustained the adequacy of findings as to injury to competitors which closely parallel, both in form and substance, those on which the order here in question is based. The Court there held that it is sufficient if, as in the present case, there are findings that other products are sold to the same type of trade and class of customers as the misrepresented product and that the misrepresentations tend to divert trade from the sellers of such other products. See also *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 651.

Petitioner also seems to contend (Pet. 15–16) that the Federal Trade Commission Act does not authorize the Commission to enter any order based upon findings as to the remedial efficacy of a patented preparation. The two *Raladam* cases, which involved orders based upon findings of this nature, clearly dispose of this contention.[4]

2. Petitioner appears to contend (Pet. 13) that since the Act of March 21, 1938, provides a penalty for violating orders of the Commission, it unconstitutionally vests judicial power in the Commission.

[4] A like contention was unsuccessfully advanced as a ground for granting certiorari in *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 77 F. (2d) 886 (C. C. A. 2), certiorari denied, 296 U. S. 617, and in *Alberty* v. *Federal Trade Commission*, 118 F. (2d) 669 (C. C. A. 9), certiorari denied, 314 U. S. 630.

But under the act the penalty applies only to violations occurring after expiration of the time allowed for obtaining judicial review or after court affirmance of the order. Imposition of a penalty to secure enforcement of an administrative order, where the defendant is given the right to obtain judicial review of the order but fails to exercise this right, does not convert the order into the equivalent of a court decree. *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962, 964, (C. C. A. 10), certiorari denied, 309 U. S. 675.[5] The statute only provides a remedy for enforcement if the person against whom the order was entered does not initiate a court proceeding to have the order set aside. Other important federal statutes of long standing have thus provided penalties for violation of administrative orders where the defendant has failed to exercise his statutory right to obtain judicial review. See the Packers and Stockyards Act of August 15, 1921, secs. 205, 306 (g), (h), 314 (a), 7 U. S. C., secs. 195, 207 (g), (h), 215 (a); Interstate Commerce Act as amended, secs. 1 (17), 16 (8), 49 U. S. C., secs. 1 (17), 16 (8).

Since the Act of March 21, 1938, makes adequate provision for judicial review of orders of the Com-

[5] For other cases sustaining the constitutionality of the provisions of the Act of March 21, 1938, relating to enforcement of orders of the Commission, see *National Candy Co.* v. *Federal Trade Commission*, 104 F. (2d) 999, 1004 (C. C. A. 7), certiorari denied, 308 U. S. 610; *Ritholz* v. *March*, 105 F. (2d) 937, 939 (App. D. C.).

mission it fully satisfies the requirements of due process. *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597. And petitioner's contention (Pet. 14) that the statute imposes an *ex post facto* penalty is equally without merit since his violations were subsequent to enactment of the legislation.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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JUNE 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

(14)

IN THE

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Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

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PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

I.

Primary Criticism of Respondent's Brief.

Respondent's brief falls into the "pattern" pointed out in the petition's "Conclusion" (pp. 19-20). It is indeed, no more than a paraphrase of the Circuit Court's opinion, except it cites some decisions; whereas that opinion offers none. [R. 76-81.] All emphasis appearing is supplied, unless otherwise credited.

"QUESTIONS."

The "pattern" proclivity is exemplified in the briefs' "Questions Presented" (p. 2). Only two are stated; and each is both inaccurate and inadequate, for any purposes hereof.

Most conspicuously, both "Questions" *omit* any reference to or suggestion of the question which, at this stage, lies at the threshold of this case, namely, the question of the *right* and *power* of the District Court to grant *the summary judgment* which is the subject matter of the present proceeding. Nevertheless, that question appears as the culmination of the Petition, on the grounds that, upon the *pleadings* before the court, such grant was not within the intent, purpose and scope of Rule 56 (c), Rules of Civil Procedure, and was wholly contrary to the principles and decisions of every case expounding and applying that rule, and the grant of summary judgment generally. (Pet. 17, "3" (b); 19, "5" and "Conclusion"; also 3, "Judgment Involved"; 5-6, "Motion for Summary Judgment".)

This is indeed striking, since those pleadings challenge not only the jurisdiction of the court to do other than *dismiss* the action because the Commission *in law* had lacked jurisdiction on the face of the pleaded record showing the existing findings (Rule 12 (b), Rules of Civil Procedure), *but also* challenge the Commission's jurisdiction *in fact*, because, on a *trial* of the Government's action, *evidence* dehors the record would be available to disprove the order's alleged basis. (Pet. 16, "3", (a).) (*Thompson v. Whitman*, 18 Wall. 457, 467-468.)

But this is even still more striking because those same pleadings interpose to the Government's action, based on alleged violation of the Commission's order by *new* advertisements, the *affirmative fact defense* [R. 30-32], particularly "V", to-wit: that such *new* advertisements, by their *own* terms, did not and could not, *in fact*, violate the order (whether entered with or without jurisdiction). This, because they did no more than represent petitioner's preparation to possess remedial value as "a gland tonic," capable of beneficially stimulating gland activity and energizing and motivating human body reactions. This, "in truth and in fact," the preparation can be shown to possess, both in composition and in operation and effect, when the *fact* thereof is *tried* and determined. And thereby, the use of the term in advertising, directly or indirectly, could not be validly inhibited in any event. (Pet. 4-6, 16-17, "3".)

But also, "Question (1)" is inaccurate: The point is *not*, that "a finding of *specific injury* to identified competitors" is required. But is, that findings of *specific facts, to induce and support conclusions of injury* to identified *competition* and identifiable competitors, are essential. Such are indispensable to show the Commission's complaint and order were each actually had *within* the limits of the authority granted by the Act of 1914; thereby to show a *valid* exercise of that *limited* power. (Pet. 3-4, "The Action"; 7-8; 15-16, "2" (a) and (c).)

"(1)" is further inaccurate: It *assumes*, as if undisputed, the Commission's order was, actually, "directed against *unfair methods* of competition." Whereas, from the outset before the Commission, petitioner has everywhere insisted the "methods" charged and found were *no*

matters of *fact* whatsoever, but lay solely and entirely in the Commission's unsupported *opinion* of the *extent* of the *therapeutic efficacy* of petitioner's *medicinal compounded preparation,* which is of itself mere matter of opinion; and that such matter of *opinion,* as the basis of any proceeding, was wholly *beyond* any authority granted, which contemplates *only* matters of *fact;* whereby the whole proceeding and order was without jurisdiction and utterly void. This question is presented, is fundamental and vital, and must be considered, as well as the one pointed out *supra.* (Pet. 3; 8-10; 15-16; "2"(b) and (c).)

"(1)" is also inadequate: Manifestly, it neglects and obscures the effect of a *statutory limitation* of jurisdiction such as affects the Commission, an administrative agency; and also the effect of any attempted exercise of power beyond such limits. Therefore, the question is not cast in terms appropriate to bring forward the real issues here involved. Instead, since it purports to cover at least half of the field of the petition, it serves only to tender a substitute issue which in its effect is wholly fictitious. The actual issues are classified and presented in the petition (pp. 12-17).

So also, regarding the second stated "Question":

"(2)" is inaccurate: There is involved *not merely* the constitutionality of the 1938 amendment's imposition of "a penalty for violating an order" of the Commission, "after expiration of the time allowed for obtaining judicial review" of the order, and none such has been had. Instead, such a statement ignores some of the most vital and fundamental questions in the case. In particular, it *begs* the primary questions: whether there was, in fact, any *"violation"* of the order; and whether, in any event, such or-

der ever had any *validity* whatever. It thus continues the policy and procedure last above noted in respect to "Question (1)."

"(2)" is likewise inadequate in respect to all the following questions:

a. The *nature* and *limits* of the judicial *function* exercisable by an administrative agency, and its *incompetency* to be vested with, or to exercise, the *constitutional judicial power* established by Article III, Secs. 1, 2, of the Constitution. (Pet. 12-13, "1"(a).)

b. The *incompetency* of an administrative agency to afford the "due process" of the Fifth Amendment of the Constitution *to adjudicate* property rights and the freedoms guaranteed by the Bill of Rights. (Pet. 13, "1"(b).)

c. The *unconstitutionality* of the 1938 amendment, *if* it is construed to vest power in the Commission to determine its *own jurisdiction* where such is *controverted*, so that its orders in that regard may become *"final"* and be treated as *res adjudicata* of the Commission's jurisdiction. (Pet. 14, "1"(c).)

d. The *unconstitutionality* of a construction of the "procedural provision" of the 1938 amendment which permits its "penalty" provision—based on the theory the Commission's order was "final"—*to deprive* a defendant of the vested right of *defense:* that an order of the Commission on which an action has been brought is *void ab initio*, for *lack* of any jurisdiction in the Commission. (Pet. 10-11; 14, "1"(d).)

e. The *utter nullity* of a judgment or order rendered without jurisdiction of the subject matter, and the resultant *right to defend* against *any action* based on such a judgment, in any appropriate manner, and even by *evidence*

dehors the record on which the judgment is pleaded to rest. (Pet. 16-17, "3"(a).)

It has already been noted that "(2)" like "(1)" omits any reference to the question of the error in *granting* this summary judgment.

Thus, "(2)" also presents only a fictitious issue, which conceals, rather than reveals, the true issues here involved. Both questions are thus unserviceable.

"STATUTES."

The brief (pp. 2-4) cuts its "statutes" to fit its "questions" thus made to appear—especially in respect to the Act of 1914.

Since it is essential to *recapture the atmosphere and the aspect of the law at the time* (1934-1937) material to some of the problems vital in this case, section 5 of that Act, in full except for the last paragraph on service of process, appears hereinafter as "Appendix A", with appropriate emphasis supplied.

"STATEMENT."

The brief's "Statement" (pp. 4-6) adheres to the "pattern." With much greater elimination, it follows the opinion's already drastically restricted lines.

Ignoring all other pleadings and proceedings, it says, p. 4: "Petitioner's *answer* admitted all the *material* allegations of the Government's complaint", for a "penalty", under "Section 5 * * * as amended March 21, 1938." But *what* "allegations" are regarded as "material" are not pointed out, or otherwise disclosed. The statement, therefore, is an unsupported conclusion, without indicated

content. Pure conclusion also, is the statement (p. 6): "Subsequently, petitoner * * * published an advertisement which *violated* the Commission's order of April 6, 1937."

Both ignore petitioner's pleaded defense, that the *new* advertisements did not, in fact, violate the order of 1937 —when the *fact question* of what may properly be designated "a tonic" is *tried* and determined. Nor do they appear violative, when the true *content* of the order, and of the new advertisements, is each *analyzed and compared*— when the result of such determination is taken as a factor. (Pet. 4-5; 8-10.) It is unnoticed in the "Statement," as in the opinion, that the truth or falsity of the *new* advertisements depends wholly upon whether petitioner's preparation has potentiality as "a gland tonic", or "gland tablet." An analysis of the original charges in the "complaint", the terms of the "order", and of the *new* advertisements in the Government's action, appears hereinafter as Appendix B.

The "Statement" (p. 4) notes grant of the summary judgment, and, in appended note "1", quotes "Rule 56(*a*) of the Rules of Civil Procedure." But (c) of that Rule is *not* mentioned. It should be. Pertinent to a grant, it declares:

> "The judgment sought shall be rendered forthwith *if* the *pleadings*, depositions, and admissions on file, together with the *affidavits*, if any, show that, except as to the amount of damages, there is *no genuine issue as to any material fact* and that the moving party is *entitled* to a judgment *as a matter of law*."

It is gratuitous assumption that even the "answer admitted" the requisite basis of a grant. But the answer

and other pleadings in the case, particularly including the exhibits in the Government's complaint, and petitioner's motion to dismiss (Rule 12(b), Rules of Civil Procedure), and his opposition to summary judgment, establish no such basis existed. There was "issue as to * * * material *fact,*" regarding both jurisdiction and violation—as well as at law. (Pet. 4-5; 8-10; 16-17; "3"(a) and (b).) And also, as Judge McCormick recognized, and reserved right in respect thereto in denying dismissal, there were *constitutional questions* for determination on " 'the *hearing* of the action *on the merits*'." (Pet. 4.)

The brief (p. 4) then notes: "The Circuit Court affirmed, characterizing the appeal as " 'frivolous'." It should be observed the same court, just previously [R. 76], had dubbed petitioner's preparation a "nostrum." It is easy to pin epithets. But, alone, they are merely question-begging. They supply neither fact nor reasoning. Rather, they tend to indicate bias and prejudice, and a predisposition to neglect or obscure any elements in a case which conflict with such preconceived ideas. True, courts are privileged and empowered to declare their conclusions. But, to render such valid and binding, it is elementary they must derive support from record facts appearing. The requisite fact basis for the above characterizations the Circuit Court did not supply. (Pet. 7-8.) Neither does the brief. (Pp. 4-5.) Both, without analysis, accept superficial conclusions, which cannot be supported.

Noting the "hearing" in *1937*, on the "complaint" "issued" in *1934*, the brief states certain other "facts", "in the Government's complaint" (filed in 1940) [R. 27], "are *undisputed*" (p. 4). These, it undertakes to set forth (p. 5). All such are based on the most superficial aspects

of the record. They appear merely as conclusions. Their actual *factual background or content* is indicated not at all, not even as far as the Circuit Court undertook by quoting some of them. (Pet. 6-7.) There is no analysis or specification. The mere fact of the *existence* of the "complaint", "findings", "order", and the conclusions "found", is, of course, admitted. But the *factual support, validity and effect* of all such is sharply *controverted*, and always has been. (Pet. 3-6, "Judgment", "The Action", "Petitioner's Pleadings", "Motion for Summary Judgment"; 6-11, "Opinion on Appeal.") And this controversy is reiterated, particularized, and supported by authority, in all its various aspects, throughout this petitioner's "Statement of Questions Presented." (Pet. 12-17.)

In particular, the brief's statement (p. 5) of matters "undisputed" *omits* all specification of the subject matter of the "certain specified representations" it mentions, the "misrepresentations" of which constitute the "unfair methods of competition" relied on by the Commission. Presumably, this omission is consonant with the brief's policy, already commented upon, of eliminating that subject matter as any part of its "Questions", particularly "(1)". It is, nevertheless, an essentially indispensable element in this case, since it eventuates in mere matter of *opinion* and not fact, to-wit, the *extent* of "the therapeutic efficacy" of the petitioner's compounded preparation. (Pet. 9-10; 15, "2".)

It is unnoticed the truth or falsity (aside from very customary "puffing"), of the subsequent nine "specified representations" in reality depends upon that of number "(1)": the preparation is "a gland tonic." [R. 5-6, "Order"; 12-13, "Complaint"; see Appendix B hereto.]

Equally unnoticed are the *previous* findings of *fact* [R. 21-23] disclosing the preparation and its content, which themselves, by common knowledge of the time (1937), show it to be "a gland tonic", both in composition and potential efficacy, *even if but one* of its active constituents, thyroid, is considered. (Pet. 5, 9.) This common knowledge of the day is confirmed by the 1937 edition of the United States Dispensatory, p. 1113, a passage from which hereinafter appears as Appendix C. In such case, it would, in any event, be incompetent for the Commission to undertake to forbid that fact being stated either directly or indirectly—merely because it might entertain a differing *opinion* upon the *extent* of therapeutic value existing in the given case. (Pet. 9-10; 15-16, "2"(a) and (b).)

Similarly, it is conspicuously true that the *content* of the *new* advertisements depends upon the capacity of the preparation as "a tonic", "gland tonic", or "gland tablet." This is demonstrated by the analysis in Appendix B hereto. The fact issue as to this was pleaded and tendered by petitioner in his answer herein, and in his opposition to a summary judgment. (Pet. 4-6.) Its rejection by both the District and Circuit Courts is one of the chief grounds of the present proceeding. (Pet. 17, "3," (b).)

Further in particular, the "Statement" (p. 5),—as another thing "found",—says, the "misrepresentations" induced "erroneous belief" which led to purchases of petitioner's preparation, "thereby diverting trade from competitors *who truthfully represent* their preparations," to their "substantial injury." Such is indeed "found"; and in exactly that form. But there is *no affirmative finding* there were *any such* competitors. It is nowhere found that, among the multiplicity of general competitors

claimed, any one of them, in fact, *did* "truthfully represent" his or its "preparation." That any such so did, is left to speculative assumption. The oblique and unsupported clause thus appended to the findings is immaterial surplusage. No "competitor" any more worthy than petitioner is now said to be, is, in fact, "found."

The "Statement's" last paragraph on p. 5, that no "review" was sought, and "the order became final within the meaning of the Act of March 21, 1938", begs some of the most fundamental questions tendered by the petition here. That any "review" was necessary, or that the "order" did, or could, become "final" under the Act cited, is most earnestly controverted throughout. (Pet. 12-14, "1", (a)-(d); 16-17, "2" (a).)

To a paragraph (p. 6) asserting the *new* "advertisement", *"violated"* the "order of April 6, 1937", the Statement appends note "3". The matters thus brought in are not frankly or fairly represented, in any of their aspects.

It is first said, "petitioner admitted the publications * * * but averred the advertisement (*new*) shows *on its face* it did not violate the order", etc., and cites "[R. *29-30*]." The pleading referred to does *not* make such an averment. But that is not all. In the record, petitioner's *affirmative fact defense follows* the above citation, and appears: R. 30-32. The note *omits all this*. It again follows the "pattern", and conceals the fact.

It is then said: "The *issue* of fact *thus* raised, * * * requires for its *determination solely* a comparison of the *words* of the advertisement with the *text* of the Commission's order." This not only *conceals* but *denies* the affirmative fact defense above specified. It also *begs* the question proposed thereby. It *assumes* the court's right

and authority thus to determine "the issue of fact"; and also *assumes* the complete validity of the Commission's order, in both law and fact. All again in the manner of the "pattern."

The note continues, that this "issue of fact" was: "*decided* adversely to petitioner by both the District Court [R. 51] and the Circuit Court of Appeals. [R. 80.]" This statement only repeats the very error of the District and Circuit Courts of which petitioner complains, namely, that the District Court, in the first instance, acted *without* power or authority, by a summary judgment, to *decide* "the issue of fact"; and again *begs* one of the very questions presented by the petition. (Pet. 17, "3" (b).) When the District Court said the matter could be disposed of on the face of the existing record, it merely held there was *no fact issue* presented. It thereby *assumed* to convert the "issue of fact" into *one of law*. But the issue was not so pleaded or presented. It was one strictly of *fact*, namely what was so as "a tonic," "in truth and in fact," [R. 31-32]; and this is confirmed by petitioner's *opposition* to a summary judgment, and his tender of *evidence on a trial*. (Pet. 5-6.) It was groundless assumption by the court, that "defendant does not take the position that this matter cannot be decided by the court on summary judgment." [R. 51.] Petitioner's whole course of pleading controverted any such conclusion. The court simply deprived petitioner of his "day in court" on his fact defense, and thereby committed the error complained of.

The note concludes: "the petition for writ of certiorari *does not request review of this question of fact.*" Just what the brief intends by this is not made clear. It reads like a paraphrase of the District Court's assumption,

quoted above, regarding *decision* of fact issue on motion for summary judgment. In any event, the statement is baseless. Throughout the petition the *grant* of summary judgment in this case is emphasized, the numerous errors involved because of it are separately and systematically specified in a related series, and, in particular, one point is devoted exclusively to the error inhering in the grant, because it was ordered when an issue of *fact* existed *to be determined.* (Pet. 17, "3", (b).) Further to disprove the brief's assertion in this note, it is only necessary to look to a few parts of the petition beside the above citation, as follows: pp. 5-6; 19, "5"; 19, "Conclusion", second line from bottom; 20, Prayer.

Rarely is found so short a paragraph containing so much of misstatement and error as does this note "3".

II.

Criticism of the "Argument."

Heading "1".

Having, as aforesaid, stripped away the substance of the Petition, the brief undertakes an "argument", under heads "1", and "2". (pp. 6-9.) Presumably, these are to relate to the previous two "Questions Presented." The discussion is both curt and cursory. Perhaps it is hoped to capitalize upon the Circuit Court's epithets, of a "frivolous" appeal, on behalf of a "nostrum." Apparently it is assumed this Court will be satisfied with the same superficiality and assumption with which the lower courts have seemed content. But the petition indicates much deeper and more far-reaching questions than the mere rights of this petitioner. Such latter are only incidental to the proper determination of fundamental rights under our

written Constitution, as against those determinations now sanctioned by those courts, in this case.

Under "1" (p. 6), is first stated what: "Petitioner contends (Pet. 15)", namely, that the Commission had no "'jurisdiction'", and its order "is void", "in the absence of *'specific findings of fact establishing injury'* to identified competitors." It is first very observable the brief's statement here is *not* that of its question "(1)" (p. 2.) There, what is said relates to *"a finding of specific injury* to identified competitors." The brief seems not to bear in mind even its own language.

But much more importantly, the part of the above in *single* quotation and there emphasized is accurately reproduced from the petition; but the remainder is not. Instead, the petition says: "to identified *competition* and identifiable competitor." (Pet. 15, "2", (a).) There is a vitally important difference. The point of the petition is, that there must be specific findings of *actual competition* with the *particular preparation* in question, whereby anyone engaging in *that competition* was, or would be, injured by any "unfair methods" employed by a defendant in the course of that competition. This is the doctrine of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651-654 (1931), which remained the law on this subject matter until the *1938* amendment of the Act of 1914; and therefore governs this case, in this aspect. It must be remembered this action is based on an *order* of the commission issued in *1937*, in a proceeding originated in *1934*. Very significantly, the above amendment, by *one* part of its provisions, completely altered this aspect, by *dispensing* with findings of *competition* when *"deceptive* acts or practices" are involved, and particularly in respect

to *"false advertisement"*, "to induce, the purchase of drugs," *et al.* (15 U. S. C. A. secs. 45 (b), 52 (a) and (b).) See Appendix A, notes 1 and 2. Obviously, this gave *fundamentally new jurisdiction* to the Commission. Else, the legislation was a vain and futile act, in this respect. (See "The Wheeler-Lea Act," Introduction, Charles Wesley Dunn. New York, 8/15/38.)

Next (p. 6), it is said: "the contention is *not timely*": because, under the *1938* amendment, the "order has become *final*"; and "petitioner failed to petition for *"review"*, as required by that amendment. In this, the brief only succeeds in again begging some of the most fundamental questions raised in the petition: whether the "order" in question was, or could become, "final"; and whether any "review" would be required in such a case as this. (Pet. 12-14, "1", (a)-(d); 16-17, "2", (a).)

Then (p. 7), it is said: "the contention is *without merit* and has been *squarely rejected* by this court." *Federal Trade Comm. v. Raladam Co.* (86 L. ed. (Adv. Ops.) 926 (2nd Raladam case) (1942), is cited, and the following is added: "See also Federal Trade Comm. v. Raladam Co., 283 U. S. 643, 651" (1931) (1st Raladam case).

These citations seem inconsistent; and incongruous and without bearing, for any purposes of the brief. The *second* case expressly *distinguishes* the first. Quoting the latter (p. 653 (3)), it then says: "Hence, these reasons are *not controlling* in this case, arising as it does out of *different* proceedings and presenting different facts and a different record for our consideration."

Then, after noting "hearings" and "much evidence" concerning "trade methods" since the earlier order, it is

said: *"This time* the Commission *found with meticulous particularity"* actual "competition", in *"fat reducing remedies"*, and actual and potential competitors.

In this connection, it appears that, in preparation for the 1935 Raladam proceeding, the Commission "developed evidence of 26 competitors". (Hearings before the Committee on Interstate and Foreign Commerce on H. R. 3143, 75th Cong. 1st Sess. (1937), page 11.)

In contrast, and negativing the brief's assertion (p. 7), the present findings show nothing "closely parallel", either "in form" or "substance". Nothing is here "found with particularity", "meticulous" or otherwise. All that is stated are the broad general conclusions of competitors and competition [R. 21], substantially and almost literally as charged in the complaint. [R. 12.] (Pet. 7-8; 15, "2" (a).)

Such latter condition, however, is "precisely parallel" to what the record showed in the *first Raladam* case, *supra*; certainly so "in substance".

Inasmuch as under the Act of 1914, the Commission was under mandatory requirement that, after hearing and before issuing its order: "it *shall* make a report in writing in which it *shall state* its findings as to the *facts*" [Appendix A, p. 1], it is necessarily to be presumed, since it was jurisdictional, that the Commission fully performed its duty in this case, and made its report, as to the *facts*, reflect fully *all facts* that were actually developed by the hearing. The general form and tenor of all the findings that appear [R. 19-26] confirm this. The case was stated in the findings as fully as it appeared. There was only *opinion and assumption*, which was wholly insufficient.

The brief's statement (p. 7), concerning what "petitioner seems to contend (Pet. 15-16)" in respect to the Commission's lack of jurisdiction "upon findings as to the remedial efficacy of a patented preparation", is inaccurate and inadequate; and its closing words: "The two Raladam cases * * * *clearly dispose* of this contention", are without bearing here, as likewise are the cases cited in appended note "4",—for the reason that no one of them is in point, in view of the *questions* therein determined.

Wherein the above statement is inaccurate and inadequate has hereinbefore been shown, in criticism of the brief's "Question (1)", and again of its "Statement" in respect to the content of "certain specified representations" and the correspondent alleged "misrepresentations". Petitioner's point is, that, in this case, upon the findings here appearing, the findings of "unfair methods" amount only to an expression of *opinion*, not fact, as to the *extent* of *"the* therapeutic *efficacy"* of the petitioner's preparation. (Pet. 8-10: 15-16, "2" (b) and (c).)

Of the brief's citations, the *first Raladam* case, 283 U. S. 643, at 647, for the purposes of its decision, expressly *assumes* "the first and third of these prerequisites" of jurisdiction in the Commission, and considers and determines only "the second", *i. e.*, "methods of *competition* in commerce". (Italics the court's.) *No decision*, therefore, is announced on any question of the content of the "methods" involved. In the *second Raladam* case, the Circuit Court, 123 F. (2d) 34, at 36 (1,2), expressly recognized this limitation, and rendered its decision accordingly. And this Court, in reversing the Circuit Court and *directing* an *affirmance* of the Commission's order, held only: "The *findings* * * * should have been *sustained* against the *attack made* upon them" (86 L. ed. (Adv. Ops.)

926, 928-929), and further said: "The respondent has *not* sought in this Court to sustain the judgment * * * on *any other* ground."

Regarding the second *Raladam* case in the Circuit Court, an oversight is noted in the petition (p. 15), where the citation is "42F(2) 430." It is as above, 123 F. (2d) 34.

Of the citations in note "4", *supra, E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. (2d) 886, 887-888, deals with an *article*, "bath salts", advertised as "imported from England" (which it was not), and "equal to treatment at spas" (which it was not since such latter included supervised regimen of diet and exercise). These were "*found* misstatements of *fact* and misleading"; and it was also found "these salts" were in competition with "all other bath salts". The authority relied on is the *first Raladam* case, *supra* (the *limitation* of which decision has just been noted), and *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 493, which involved "Australian" or adulterated wool *passed off* as pure wool. This is the first of the line of cases dealing with the *passing off* of a concrete *article or thing* as something else. This, or like cases, certainly present no analogy to one where an *opinion* of the *extent* of *"the therapeutic efficacy"* of a compounded medicinal preparation is alone involved, such as the present. (Pet. 9-10.) The Commission itself, in the hearings before the House Commerce Committee prior to the 1938 amendment, entertained the same view. It appears that, in claiming jurisdiction over all advertising, in any form, the Commissioner speaking, Judge Davis, made the very qualification, thus: "I mean of *articles* sold in interstate commerce";—thus truly reflecting the state of the law. (Hearing, House Committee

on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937), p. 58.)

The other case in note "4", *supra, Alberty v. Federal Trade Commission,* 118 F. (2d) 669, 670, is *based* on the 1938 *amendment;* therein *"competitors"* were "conceded"; and "the *entire* order" was *not* attacked. It clearly can have no pertinency to what the present record presents *under the act of 1914.* Here, the *whole order* is challenged on its own findings, and the Commission's *jurisdiction* is challenged as well. But, if the case could be considered, it would be helpful to petitioner, rather, than harmful. The opinion of the concurring judge throws some light on matters of *opinion* as ground of jurisdiction in the Commission, at any time.

Heading "2".

The brief's statement here (p. 7): "Petitioner appears to contend (Pet. 13)", that the amendment, "since (it) provides *a penalty* for violating *orders* * * *, it *unconstitutionally* vests *judicial power* in the Commission", is wholly erroneous, in every respect. In the first place, such a statement begs one of the primary questions in this case: whether there *is* any "order" here, subject to *violation.* (Pet. 15-16.) But, more than that, petitioner does not contend as stated. The thrust of his attack here is much deeper and more far-reaching. It goes to the very foundation of our American system, to the integrity of our written constitutional government, and to the preservation of those rights and freedoms which we believe to be our aegis as free men. (Pet. 12-14.) All these, petitioner contends should not be imperilled, upon the plea of an exigency in the face of multifarious complicated governmental activities and demands, however

well-founded such plea may be. On the contrary, petitioner contends all purposes may be served at the same time, by due attention to the necessary "checks and balances" to guard against the ever-present proclivities of human nature; and he further contends that existing principles, in established precedents, point the way. On such principles, he has built the structure of his entire petition.

Speaking to the brief's language on page 8, let it be conceded Congress may constitutionally provide penalties as means of enforcing an administrative order, after such an order has in some manner become *final;* and that such finality may be conditioned upon a judicial *review* within a term. But, petitioner's points thereupon are, that the administrative order must first be *valid;* that to be so, it must have been issued *within* the administrative agency's *limited jurisdiction;* that such an agency may *not,* constitutionally, exercise or be authorized to exercise *"constitutional judicial power",* or determine its own jurisdiction, because such involves the interpretation and construction of Federal legislation and the Federal Constitution. (Pet. 12-14, "1" (a), (b), (c); "2" (a), (b), (c).) It is cheerfully conceded, as the brief states (p. 8), the mere "imposition of a penalty to secure enforcement, * * * does not convert the (Commission's) order into the equivalent of a court decree". It is the very point of petitioner's contentions that it could not constitutionally do so, and particularly not in this case. (Pet. 12-14, "1" (a), (b), (c).) But the brief's statement implies that "the order" has issued *within* the Commission's jurisdiction, and is therefore *valid.* Both of these implications petitioner squarely repels and controverts in this case. (Pet. 15-16,

"2".) So also of the further statement (p. 8): "The statute only provides a remedy for *enforcement* if," (there is *no*) *"court proceeding* to set the order aside." The brief's citations support these statements. But two of them involve *gambling* devices and rest upon *public policy* against such. Neither involves any question of the order's *invalidity* on account of the form of the findings on which it rested. *Osler Candy Co. v. Federal Trade Commission,* 106 F. (2d) 962, 964, announces the doctrines the brief states, and relies on *National Candy Co. v. Federal Trade Commission,* 104 F. (2d) 999, 1004, also cited by the brief in an appended note "5" (p. 8). The latter case (p. 1004) declares the Commission is no more than "a *quasi-judicial* tribunal", and "its orders are *administrative orders* as *distinguished* from *judicial decrees".* This is all in accord with petitioner's contentions. (Pet. 12-13, "1" (a), (b).) The last case in note "5" (p. 8), *Ritholz v. March,* 105 F. (2d) 937, 939, was for *injunction* to stay a *pending proceeding* by the Commission, on the ground the 1938 amendment had *repealed* the Act of 1914; and this was denied. What the charges in the proceeding were is not disclosed.

The brief cites "Packers and Stockyards Act of August 15, 1921," (7 U. S. C., secs. 195, 207 (g), (h), 215 (a)) and "Interstate Commerce Act as amended" (49 U. S. C., secs. 1 (17), 16 (8)), as instances of *penalties* provided after *failure* to review. But the brief does not observe that *St. Joseph Stock Yard Co. v. United States,* 298 U. S. 38, for an *injunction,* arose under the Packers and Stockyards Act. (See Pet. 13, "1" (b), and 14, "1" (c).) It may be noted part of this case (pp. 49, "Third", to 54, "Fourth") was read, *in toto,* into the record of the Congressional proceedings eventually leading to the 1938

amendment, along with a reference to *Curtis Pub. Co. v. Federal Trade Commission,* 270 F. 881, affirmed 260 U. S. 567. (Cong. Rec., 74th Cong., 2nd Sess., p. 6601.)

The brief also does not observe that, under the "Interstate Commerce Act", "it has been settled that the *orders* of the Commission are *final unless* (1) *beyond* the power it could *constitutionally* exercise; or (2) beyond its *statutory* power; or (3) based upon a mistake of law". *(Int. Com. Comm. v. Un. P. R. Co.,* 222 U. S. 541, 547.) And this *finality* did not prevent this court from affirming an *injunction* against an order of the Commission, on the ground the Commission had erred in its interpretation of the *facts* in the matter of a "rebate". *(Int. Com. Comm. v. Diffenbaugh,* 222 U. S. 42, 45-46.)

The brief (pp. 8-9) next asserts the 1938 amendment's provision for "judicial review", "satisfies the requirements of due process". It is not stated *what* "due process" is intended. In such connection, the "requirement" has *two* meanings: the due process of the administrative system, when there is *no challenge* to the agency's jurisdiction; and the "due process" of the Fifth Amendment to the Constitution or that required to determine questions within the Bill of Rights. There is a wide difference. (Pet. 13-14, "1" (b), (c).) This difference is recognized even in the case which the brief cites (p. 9), *Phillips v. Commissioner,* 283 U. S. 589, 596-597. That case involved the summary collection of a *tax assessment,* and the validity of the statutory method was sustained as affording due process. But, as a premise, it is said: "The right of the United States to *collect its internal revenue* by *summary administrative* process has long been settled" (p. 595); and, in sustaining the process as "due" under the circumstances, the court was careful to say that

the principle applied: "save as there may be an *exception* for issues presenting *claims of constitutional right*". (p. 600.)

The brief closes (p. 9) with the "pattern" statement that "petitioner's contention", regarding "an *ex post facto* penalty is equally without merit", because "his *violations* were subsequent" to the amendment. Thus again, is misapprehended or ignored the point petitioner really makes. (Pet. 10-11; 14 "2" (d).)

Conclusion.

It is respectfully submitted respondent's brief affords nothing but additional grounds and reasons for grant of certiorari in this case.

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